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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY,
Petitioner,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

**BRIEF OF RESPONDENT IN RESPONSE
TO THE PETITION**

WILLIAM G. MAHONEY
JOHN O'B. CLARKE, JR.*
HIGHSAW & MAHONEY, P.C.
Suite 210
1050 17th Street, N.W.
Washington, D.C. 20036
(202) 296-8500
Attorneys for Respondent
Railway Labor Executives'
Association

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* Counsel of Record

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No. 87-1589

THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY,
v. *Petitioner,*

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit**

**BRIEF OF RESPONDENT IN RESPONSE
TO THE PETITION**

On March 24, 1988, petitioner Pittsburgh & Lake Erie Railroad Company [hereinafter, "P&LE"] filed a petition with this Court asking that a writ of certiorari be issued to the United States Court of Appeals for the Third Circuit to review the decision of that Court in *Railway Labor Executives' Association v. P&LE*, 831 F.2d 1231. Respondent Railway Labor Executives' Association [hereinafter, "RLEA"]¹ respectfully submits that this Court should withhold a decision on this peti-

¹ RLEA is a voluntary association of the chief executive officers of nineteen (19) labor organizations which collectively represent virtually all organized rail employees in this Country. RLEA's member organizations are listed in Appendix C attached hereto.

tion until a final ruling is issued in the pending cases dealing with the underlying issue in this dispute—*i.e.*, the proper relationship of the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*, to the Railway Labor Act, 45 U.S.C. § 151, *et seq.* Those cases, at present, are: *RLEA v. Guilford Transportation Industries, Inc.*, Sup. Ct. No. 87-1911, and *P&LE v. RLEA*, Sup. Ct. No. 87-1888.²

JURISDICTION

Respondent RLEA agrees with petitioner P&LE that this Court has jurisdiction to consider this petition under 28 U.S.C. § 1254(1). However, RLEA disputes petitioner's inference that the district court had jurisdiction to consider the P&LE's complaint for injunctive relief to enforce the Interstate Commerce Act by issuing a strike injunction. Indeed, whether the district court had jurisdiction to issue such an injunction is the question presented by this petition.

COUNTERSTATEMENT OF THE CASE

In early July 1987, petitioner P&LE entered into an agreement with P&LE Railco, Inc., a newly formed railroad subsidiary of a corporation affiliated with several small railroads, to sell to Railco its rail facilities and operations, except for approximately 6,000 rail cars and certain real estate. Transcript of September 16, 1987 Hearing [hereinafter, "Tr."] at 15. Under the terms of that agreement, Railco would operate the P&LE, but would do so under new rates of pay, rules and working conditions, and would hire only about one-third of the

² On May 31, 1988, the Eighth Circuit issued a decision in *RLEA v. Chicago & Northwestern Transportation Co.*, 8th Cir. No. 87-5071, which reached a result in direct conflict with that of the Third Circuit in Sup. Ct. No. 87-1888. That decision has been reproduced herein as Appendix B at 21a-25a. RLEA will be filing a petition for a writ of certiorari in that case, possibly before June 15, 1988, and will suggest that the *Chicago & Northwestern* case be the test vehicle if the *Guilford* petition is not accepted for review.

P&LE's approximately 750 employees. Appendix B to Petition [hereinafter, "Pet. App."] at B-2, ¶'s 5, 7, 8.

Twenty-two days after it entered into its sale agreement with Railco, the P&LE sent a letter to all of its employees' representatives, attaching a copy of a letter which that carrier was sending to its employees informing them that the rumors they had heard were true and that the P&LE had entered into an agreement to sell its railroad operations. Exhibit D to RLEA Appendix in 3rd Cir. No. 87-3664 at A. That letter further notified the unions that: "You will be provided with additional information concerning the [sale] transaction as it develops." *Id.* Rail labor responded to the P&LE's announcement by stating that "such a change in ownership will have a significant impact on the working conditions of the P&LE employees" and that "any consummation of this transaction without negotiations pursuant to the Railway Labor Act will be a violation of that statute." *Id.* at B. Rail labor then proposed an expeditious meeting "to negotiate concerning all aspects of this matter including, but not limited to, the decision to sell the rail lines and other assets of the P&LE and the effects of such a transaction on P&LE's employees . . ." *Id.* Rail labor also requested "all information available regarding this transaction . . ." *Id.*

Petitioner subsequently responded on August 17, 1987, proposing to meet in early September. Exhibit D, *supra* at D. That meeting, according to the P&LE would not be to negotiate, but rather, would be "informational" "in the interests of keeping employees informed of plans for the P&LE's future, without prejudice to [its] . . . position that 'Section 6' bargaining under the Railway Labor Act is not necessary or appropriate in this instance." *Id.* According to the P&LE (*Id.*):

The anticipated transaction is controlled by the Interstate Commerce Act and is subject to the authority of the Interstate Commerce Commission. Section

6 bargaining, in the railroad's view, would usurp the ICC's authority over the transaction and management's prerogative to conduct the railroad's business as it sees fit.

Most, but not all, of the unions responded by serving notices on the P&LE under Section 6 of the Railway Labor Act, 45 U.S.C. § 156, proposing agreements to deal with the impact of the sale on the P&LE's employees. *E.g.*, Exhibit D, *supra*, at E. Rail labor proposed that the initial conference on those notices be held on September 8, 1987, but on September 1, the P&LE replied that it could not meet on September 8 as labor had proposed and suggested a date of September 25. Exhibit D at F. Fearful that the sale was imminent, rail labor requested on September 4, a meeting earlier than September 25 (*Id.* at G), and when the P&LE did not reply, rail labor struck the P&LE on September 15, 1987.

Petitioner P&LE, on September 16, 1987, asked the United States District Court for the Western District of Pennsylvania to enjoin that strike, and after an unsuccessful effort to resolve this dispute by negotiations during which the strike was called off for slightly more than two days (*see*, Pet. App. at B-3, ¶ 14), the district court relied upon Section 8 of the Norris-LaGuardia Act, 29 U.S.C. § 108,³ to deny the P&LE's request for relief on September 21, 1987. Subsequently, the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] denied RLEA's efforts to stay the exemptions under 49 U.S.C. § 10505 which Railco and its related corporations

³ Section 8 of the Norris-LaGuardia Act provides as follows:

No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

had exercised to be relieved of the prior approval requirements of the Interstate Commerce Act, and on October 5, 1987, petitioner P&LE renewed its request for injunctive relief.

On October 8, 1987, the district court issued an interim injunction⁴ which enjoined rail labor from striking the P&LE. Pet. App. at B-9. According to the district court, rail labor's strike was intended to, and had "the effect of frustrating and avoiding the terms of the sale as approved by the ICC." Pet. App. at B-5, ¶ 27. Based upon that finding, the court concluded that the strike was illegal in that it sought to force the P&LE to provide benefits to employees who may be affected by the proposed sale where the ICC has not required such benefits as a condition of its sale exemption. *Id.* at B-7, ¶ 5. Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, did not deprive the court of jurisdiction to enjoin such a strike, the district court concluded, because the "anti-injunction provisions of the Norris-LaGuardia Act are displaced by the jurisdiction of the ICC in the Interstate Commerce Act." *Id.* at B-8, ¶ 9. Moreover, Section 8 of the Norris-LaGuardia Act did not deprive the P&LE of standing to seek an injunction because the "Interstate Commerce Act exemption has relieved P&LE of the duty to bargain with its employees . . ." *Id.* at B-7, ¶ 7.

Respondent RLEA noted an appeal from that injunctive order and sought summary reversal on jurisdictional grounds. On October 26, 1987, the United States Court of Appeals for the Third Circuit issued its decision reversing the order of the district court because it concluded that the lower court was without jurisdiction to issue a strike injunction to enforce the Interstate Commerce Act. Pet. App. at A-13.

⁴ While the district court termed its injunction a Temporary Restraining Order (*see*, Pet. App. at B-10), it was, as the court of appeals concluded, a preliminary injunction because it was not of a limited duration. *See*, Pet. App. at A-2 n.1. Petitioners have not challenged that jurisdictional ruling.

After examining the purposes of the Interstate Commerce Act, the Court noted that:

The ICC's authority to consider the incidental effect of the transaction on labor and its discretionary authority to require provisions that protect employees do not make the Interstate Commerce Act comparable to the Railway Labor Act, which contains a comprehensive scheme of alternative dispute resolution mechanisms.

Pet. App. at A-9. The appellate court then observed that this Court in *Order of Railroad Telegraphers v. Chicago & North Western Ry.*, 362 U.S. 330 (1960), had declined to accommodate the policies of the Norris-LaGuardia Act to the policies of the Interstate Commerce Act. *Id.* at A-10. That holding and the decision in *Texas & New Orleans R.R. v. Brotherhood of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962), cert. denied, 371 U.S. 952 (1963), the appellate court concluded, were applicable to this case because they showed "that the Interstate Commerce Act is not one of those rare statutes to which the Norris-LaGuardia Act must be accommodated." Pet. App. at A-11.

Quoting *Texas & New Orleans* (307 F.2d at 157), which in turn quoted this Court in *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R. Co.*, 353 U.S. 30, 41 (1957), the court concluded that:

Such an accommodation need only be made "where Congress, through such detailed legislation as the Railway Labor Act and Taft Hartley Act . . . , has 'channelled these economic forces [capital and labor] . . . into special processes intended to compromise them' . . . and where these processes would be frustrated without injunctive aid."

The court, again quoting *Texas & New Orleans* (307 F.2d at 158), then observed that the special processes which the courts have enforced with injunctive relief

have all involved extensive negotiations and bargaining between the parties, or agreements which result from such bargaining; never processes which allow management to unilaterally choose a change in working conditions and give the union a small voice of protest if the change is unfair or inequitable.

Pet. App. at A-11. As the Third Circuit stated: "This language is directly applicable here, since, in the absence of any provision requiring 'extensive negotiations and bargaining,' RLEA and the employees it represents would be relegated to 'a small voice of protest' without the possibility of either negotiation or economic self-help." Pet. App. at A-11/A-12 (footnote omitted).

SUMMARY OF ARGUMENTS

While respondent RLEA agrees with petitioner and *amicus* that the issues presented by the cases which are presently before this Court dealing with the relationship among the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*, the Railway Labor Act, 45 U.S.C. 151, *et seq.*, and the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*, are extremely important to the entire rail industry, respondent submits that this case is not the best vehicle to begin the resolution of these issues. Rather, the issues presented by those cases which deal with whether rail labor must strike to force the carriers to the bargaining table, or whether rail labor can instead appeal to the federal courts to enforce the Railway Labor Act, should be the first class of cases decided. If rail labor's position is sustained in those cases (*see, Sup. Ct. No. 87-1911, RLEA v. Guilford Transportation Industries, Inc.*), then there will be no need to review this case because there will be no need to strike, unless of course the bargaining fails to result in an agreement.

Another reason why there is no need to grant the writ of certiorari in this case at this time is that there is no conflict among the lower courts or with any prior deci-

sion by this Court on the issues presented by this case. All of the lower courts which have addressed the ability of federal courts to enjoin strikes arising from the railroads' refusal to bargain with rail labor over sales exempted from regulation under 49 U.S.C. § 10901 by the Commission acting under 49 U.S.C. § 10505 have concluded that they lack such jurisdiction. See, *Burlington Northern R.R. v. UTU*, 8th Cir. Nos. 87-2581 and 87-2600, decided May 31, 1988. Moreover that conclusion is compelled by this Court's oft-repeated admonition that the Norris-LaGuardia Act is not to be accommodated to a nonlabor statute, such as the Interstate Commerce Act (e.g., *Order of Railroad Telegraphers v. Chicago & North Western Ry.*, 362 U.S. 330, 339 (1960)), and should not even be accommodated to the specific command of a labor statute where a strike injunction would strip labor of its ability to resolve its dispute with management through a dispute resolution process that channels equally the forces of labor and management. Forcing rail labor to rely upon the unreviewable discretion of the ICC to obtain whatever protection the ICC concludes is compelled by the public interest, while giving management the absolute right to establish the terms of the transaction to be exempted from regulation, is not the type of dispute resolution process to which the Norris-LaGuardia Act may be accommodated. E.g., *Texas & New Orleans R.R. v. Brotherhood of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962), cert. denied, 371 U.S. 952 (1963).

ARGUMENTS

1. RLEA agrees with petitioner P&LE and *amicus* National Railway Labor Conference [hereinafter, "NLRC"] that the impact of the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*, on the ability of rail labor to bargain over the effects of ICC regulated transactions on rail employees' working conditions, "is the most-litigated and most important railway labor-management controversy now facing the federal courts." NLRC Brief at 10. However, respondent RLEA disagrees with petitioner's and *amicus'* brief that this case is the best vehicle to resolve this controversy, for, while the issue presented—*i.e.*, whether the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*, is to be "accommodated" to the Interstate Commerce Act—is important to the rail industry, that issue is not the most crucial question which needs to be resolved. Moreover, this case does not present an issue which needs to be resolved quickly, for it does not present a conflict among the lower courts or with any decision by this Court.

When the controversy over the relationship between the Interstate Commerce Act and rail labor's bargaining ability is examined critically, it becomes apparent that there are essentially four separate questions presented by this dispute. First, there is the question whether the specific immunity granted by 49 U.S.C. § 11341(a) to carriers participating in ICC approved unification financial transactions applies to transactions exempted from regulation by 49 U.S.C. § 10505 and relieves rail carriers of their Railway Labor Act and collective bargaining obligations. A case which presents this question is *RLEA v. Guilford Transportation Industries, Inc.*, Sup. Ct. No. 87-1911.

Second, there is the question which underlies this entire controversy, and that is whether Congress gave the ICC exclusive jurisdiction over all aspects of rail financial transactions subject to regulation by the Interstate

Commerce Act, including labor relations matters. This question is presented in the *Guilford* case and to varying degrees by virtually every case dealing with the relationship between ICC orders and rail labor's collective bargaining and Railway Labor Act rights, including this case.

Third, there is the question whether federal courts have jurisdiction to enforce the Railway Labor Act or contractual rights of employees in the face of an assertion that such a suit would be a collateral attack on the ICC's order. Again, the *Guilford* case is an example of this question, as well as the second P&LE case, i.e., Sup. Ct. No. 87-1888, and those cases arising from rail labor's attempts to enforce the Railway Labor Act and collective bargaining agreements. Contrary to the P&LE's arguments, this case does not present that issue because a strike cannot be viewed as a "collateral attack" on an ICC order; a collateral attack, RLEA respectfully submits, requires some form of judicial or quasi-judicial enforcement of rights supposedly barred by the ICC order.⁵

Finally, there is the question which arises when rail labor is unable to bargain or to enforce its contractual or Railway Labor Act rights and must strike to enforce those rights; that issue is whether the Norris-LaGuardia Act must be "accommodated" to the ICC's jurisdiction over rail financial transactions. This case is an example of this question; but this question is of only academic concern if rail employees can enforce their contractual and Railway Labor Act rights notwithstanding the railroads' assertions that orders of the ICC operate to relieve them of their bargaining and contractual obligations to their employees.

⁵ Petitioner relies upon *Venner v. Michigan Central R.R.*, 271 U.S. 127 (1926), to support its collateral attack argument, but *Venner* is inapplicable because it involved a court suit to enforce rights asserted to be in conflict with the ICC's order. Here, it is the railroad which seeks to invoke the Court's jurisdiction to enjoin the strike by relying upon the ICC's order.

As RLEA shows below, the Norris-LaGuardia Act accommodation question, unlike the Interstate Commerce Act-Railway Labor Act relationship questions, has not been decided in conflicting ways by the lower courts. E.g., *Burlington Northern R.R. v. UTU*, 8th Cir. Nos. 87-2581 and 87-2600.⁶ Moreover, contrary to petitioner's and *amicus'* assertions, refusing to accommodate the anti-injunction Act to the transportation Act, is entirely consistent with prior decisions by this Court, for this Court has refused to accommodate the anti-injunction Act to nonlabor statutes, such as the Interstate Commerce Act, and has stressed that exceptions to the Norris-LaGuardia Act are rare. E.g., *Burlington Northern R.R. v. BMWE*, 481 U.S. —, 95 L. Ed.2d 381, 397 (1987).

When it is remembered that the strike occurred in this case because rail labor had previously been unable to enforce the Railway Labor Act's commands in situations involving ICC orders, the first issue which should be examined, RLEA respectfully submits, is the need for the strike, and not whether such a strike can be enjoined. Consequently, RLEA respectfully suggests that this Court review the validity of the ICC's and the railroad's beliefs that ICC orders supersede rail employees' collective bargaining rights. If there is still a need to resolve the issue presented by this case after the causation issue is resolved, RLEA suggests that this Court either grant the petition for a writ in this case or accept review of the recently decided *Burlington Northern R.R. v. UTU*, *supra*, if, as RLEA suspects will occur, the Burlington Northern or rail labor seeks a writ of certiorari after the railroad has sought rehearing by the full Eighth Circuit.

2. Contrary to the P&LE's and *amicus'* assertions, RLEA respectfully submits, the decision below does not

⁶ Respondent has reproduced that recent decision as Appendix A to this brief.

conflict with any prior decisions of this Court. In fact, the decision below is entirely consistent with the decisions of this Court in *Burlington Northern R.R. v. BMWE, supra*, and *Order of Railroad Telegraphers v. Chicago & North Western R.R., supra*, 362 U.S. at 339.

It should be beyond dispute in this case⁷ that the dispute between rail labor and the P&LE which resulted in the strike—*i.e.*, the planned sale of the railroad and the elimination of approximately two-thirds of the jobs and the drastic change of the employment terms of the remaining jobs—is a “labor dispute” within the meaning of Section 13(c) of the Norris-LaGuardia Act, 29 U.S.C. § 113(c).⁸ Consequently, the strictures of the Norris-LaGuardia Act apply to this case and deprive the federal courts of jurisdiction to issue a strike injunction unless this case presents one of those “limited circumstances” in which the anti-injunction provisions of the Act must be “accommodated” to enjoin “violations of the specific mandate of another *labor* statute.” *Burlington Northern R.R. v. BMWE, supra*, 95 L. Ed.2d at 397 (emphasis added).

This case does not present one of those “limited circumstances” for several reasons, not the least of which is that a strike by rail labor does not violate any command

⁷ Petitioner asserts that RLEA and its member unions are not acting as labor unions because they are trying to have the P&LE sell its rail operations to rail labor. First, there is no finding by the courts below to that effect, and second, petitioner is not precluded by the judgment in this case from seeking to enjoin a strike because the dispute over which the strike is occurring is not a “labor dispute.” *E.g., Bakery Drivers v. Wagshal*, 333 U.S. 437 (1948).

⁸ Section 13(c) of the Norris-LaGuardia Act provides that:

The term “labor dispute” includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

of the Interstate Commerce Act or order of the ICC. Petitioner P&LE and the NRLC have not pointed to any specific statutory command which in their opinion, was violated by the strike in this case. Rather, they assert, this strike is “illegal” because by it rail labor seeks to achieve a result—*i.e.*, an agreement to protect employees from the adverse consequences of the sale—which the ICC has refused to impose when requested to do so by RLEA. Pet. App. at B-7, ¶ 5. According to the NRLC, it is inconceivable that employees should be able by a strike to block rail transactions which the ICC has concluded are in the public’s interest. NRLC Brief at 18.

Petitioner’s disbelief that Congress could have intended to allow rail labor to strike over the impact of ICC orders on employees does not make such a strike a violation of the Interstate Commerce Act. Indeed, “[a]bsent clear congressional intent to the contrary, peaceful boycotts and nonviolent picketing are a form of speech or conduct ordinarily entitled to protection under the first and fourteenth amendments to the Constitution.” *Richmond, Fredericksburg & Potomac R.R. v. BMWE*, 795 F.2d 1161, 1163 (4th Cir. 1986), cert. denied, 107 S. Ct. 1971 (1987). Here, Congress has decreed in Section 20 of the Clayton Antitrust Act, 29 U.S.C. § 52, that peaceful strikes “shall [not] . . . be considered or held to be violations of any law of the United States[,]” including, RLEA respectfully submits, the Interstate Commerce Act. *E.g.*, 51 Cong. Rec. 13664 (Aug. 13, 1914) (Remarks of Sen. Ashurst); 51 Cong. Rec. 13919 (Aug. 18, 1914) (Remarks of Sen. Borah); 51 Cong. Rec. 14367 (Aug. 28, 1914) (Remarks of Sen. Walsh). That immunity has not been modified insofar as the Interstate Commerce Act is concerned by any subsequent congressional legislation.

Moreover, in *Order of Railroad Telegraphers, supra*, 362 U.S. at 338-41, this Court addressed the question of whether the Railway Labor Act or the Interstate Commerce Act made it unlawful for a labor organization to

ask a railroad to bargain over the effect on employees of actions subject to regulation under the Interstate Commerce Act.⁹ This Court stated that: "There is no express provision of law, and certainly we can infer none from the Interstate Commerce Act, making it unlawful for unions to want to discuss with railroads actions that may vitally and adversely affect the security, seniority and stability of railroad jobs." 362 U.S. at 340 (footnote omitted). Indeed, after examining the extensive history of bargaining over such subjects, this Court stated (362 U.S. at 338):

In an effort to prevent a disruption and stoppage of interstate commerce, the trend of legislation affecting railroads and railroad employees has been to broaden, not narrow, the scope of subjects about which workers and railroads may or must negotiate and bargain collectively. Furthermore, the whole idea of what is bargainable has been greatly affected by the practices and customs of the railroads and their employees themselves. It is too late now to argue that employees can have no collective voice to influence railroads to act in a way that will preserve the interests of the employees as well as the interests of the railroad and the public at large.

In *Telegraphers*, this Court noted that nothing about which the union had sought to bargain "would require the railroad to violate any valid law or the valid order of any public agency" (361 U.S. at 340), but that observation is of no comfort to the P&LE, for there is no law or order of the ICC in this case which holds that provid-

⁹ Petitioner and the NRLC both assert that *Telegraphers* did not involve an interpretation of the Interstate Commerce Act because only state action was involved. If state action was all that was involved, then the Railway Labor Act would have clearly preempted the state laws. E.g., *UTU v. Long Island R.R.*, 455 U.S. 678 (1982). But more was involved because Congress had delegated to the states the power to regulate station closings. See, Brief for Respondents in Sup. Ct. No. 100, 1959 Term, at 47-55.

ing an equitable arrangement to protect employees who may be affected by this sale would be contrary to the public interest. Rather, the ICC's decision in *Ex Parte No. 392 (Sub-No. 1), Class Exemption For The Acquisition and Operation of Rail Lines under 49 U.S.C. 10901*, 1 I.C.C. 2d 810 (1985), *aff'd sub nom. Illinois Commerce Comm. v. ICC*, 817 F.2d 145 (D.C. Cir. 1987) (table), merely concluded that the public interest did not require the ICC to impose such conditions in Section 10901 sales exempted from regulation. 1 I.C.C. 2d at 815. Indeed, in the recent ICC decision in ICC Finance Docket No. 31205, *FRVR Corp.—Exemption Acquisition and Operation*, served January 29, 1988 at 3 (footnote omitted), *pet. for review pending, RLEA v. ICC*, 8th Cir. No. 88-1280 (reproduced as Appendix B to NRLC Brief), the ICC noted that it would consider a sale case to present "exceptional circumstances" warranting the imposition of employee protective provisions if there were "existing contracts [which] specified that line sales were subject to procedural or substantive protection." NRLC Appendix B at 7a.

Consequently, the decision by this Court in *Order of Railroad Telegraphers* strongly supports respondents' assertions and the Third Circuit's inference that rail labor's efforts to use its economic power to obtain some form of protection for its members did not violate any command of the Interstate Commerce Act or order of the ICC. Pet. App. at A-10.

But even if it were assumed *arguendo* that rail labor's efforts to obtain an equitable arrangement to protect P&LE employees affected by sales or other rail financial transactions, was unlawful under the Interstate Commerce Act, that assumption would still not justify a strike injunction because the Interstate Commerce Act is not a labor statute. Petitioner P&LE and the NRLC seek to overcome this hurdle by arguing that the ICC's authority to consider and to protect employee interests

as part of the public interest makes this aspect of the Act a "labor statute" for purposes of accommodating the strictures of the Norris-LaGuardia Act to the congressional purposes fostered by the Interstate Commerce Act. Such an accommodation, petitioner and *amicus* argue, is compelled by this Court's decision in *United States v. Lowden*, 308 U.S. 225 (1934), where this Court "acknowledged the interplay between ICC approvals of railroad consolidations and effects upon rail labor . . ." Petition at 18. That argument is without merit, but what is more important here, is not so compelling as to require that this case be reviewed first, if this Court accepts the pleas of the entire rail industry and examines the proper relationship of both the Interstate Commerce Act and ICC orders to the Railway Labor Act.

In *Lowden* this Court held that the ICC had the power to impose conditions designed to protect employee interests upon its order approving a rail financial transaction. 308 U.S. at 235-36. But that holding was not premised upon an assumption that the Interstate Commerce Act was a labor statute or, more importantly, that the transportation statute gave the Commission exclusive jurisdiction over labor disputes arising from ICC approved transactions. Rather, this Court framed the "single question" it was deciding as (308 U.S. at 231):

[W]hether we can say, as matter of law, that the granting or withholding of the protection afforded to the employees by the prescribed conditions can have no influence or effect upon the maintenance of an adequate and efficient transportation system which the statute recognizes as a matter of public concern.

This Court then concluded that (308 U.S. at 234):

One must disregard the entire history of railroad labor relations in the United States to be able to say that the just and reasonable treatment of railroad employees in mitigation of the hardship im-

posed on them in carrying out the national policy of railway consolidation, has no bearing on the successful prosecution of that policy and no relationship to the maintenance of an adequate and efficient transportation system.

In other words, this Court held in *Lowden* that the ICC had the power to consider and to protect employee interests when it decided whether, in that case, a consolidation transaction was within the public interest. But, as important here, *Lowden* did not hold that the Interstate Commerce Act withdrew from rail labor the ability to devise its own form of protection through negotiations under the Railway Labor Act.

Petitioner's and *amicus'* reliance on *Lowden* is misplaced for another reason as well. Even if the transportation Act could be viewed as being a labor statute, that would still not justify an accommodation of the policies of the Norris-LaGuardia Act in this case. This Court has emphasized that even where there is a violation of a specific mandate of the Railway Act, federal courts "should hesitate to fix upon the injunction remedy . . . unless that remedy alone can effectively guard the plaintiff's right." *Burlington Northern R.R. v. BMWE*, *supra*, 95 L. Ed.2d at 398, quoting *IAM v. Street*, 367 U.S. 740, 773 (1961). Moreover, an accommodation should not be made when "the injunction strips labor of its primary weapon without substituting any reasonable alternative." *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30, 41 (1957).

Here, an injunction would strip rail labor of its primary and, indeed, only weapon without substituting any reasonable alternative, for the ICC has emphatically stated that it will not impose provisions to protect employees unless the impact on rail labor is "unique, disproportionate to the gains achieved for the local transport system, and . . . can be compensated without causing termination of the transaction or substantially undoing

the prospective benefits of the Commission's existing policy for other communities and locales." *FRVR Corp.—Exemption*, *supra*, NRLC App. B at 7a-8a (footnote omitted). Indeed, the ICC has not found one instance in the more than 150 cases involving an exercise of the exemption granted by *Ex Parte No. 392* where it has concluded that employee protection should be imposed. *Id.* at 3a-8a. That fact was fully appreciated by the Third Circuit in this case when it concluded that the Norris-LaGuardia Act's ban of federal court injunctions should not be accommodated to the policies of the Interstate Commerce Act. Pet. App. at A-11/A-12.

3. Contrary to petitioner P&LE's assertion, the Third Circuit's decision in the strike injunction case does not conflict with decisions by other circuits faced with similar issues.

According to petitioner, the Third Circuit's decision in this case conflicts with the decisions by the Eighth Circuit in *Missouri Pacific R.R. v. UTU*, 788 F.2d 107 (8th Cir. 1986), cert. denied, 107 S. Ct. 3209 (1987), and by the Fifth Circuit in *Texas & New Orleans R.R. v. Brotherhood of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962), cert. denied, 371 U.S. 952 (1963). However, an examination of those cases, especially when viewed in light of the Eighth Circuit's recent decision in *Burlington Northern R.R. v. UTU*, 8th Cir. Nos. 87-2581 and 87-2600, decided May 31, 1988, shows that there is no conflict among the circuits.

In *Burlington Northern*, the Eighth Circuit reached a result similar to that reached by the Third Circuit in this case in an identical factual situation—*i.e.*, a strike over a railroad's refusal to bargain concerning the impact on employees of a sale exempted from regulation by *Ex Parte No. 392*. While the Eighth Circuit concluded, erroneously RLEA respectfully submits, that such an exemption relieves a rail carrier of its Railway Labor

Act obligations (*see, Appendix A at 12a-13a*), it also held that the Norris-LaGuardia Act was not to be accommodated to the policies of the Interstate Commerce Act as set forth in Section 10901 of that Act, 49 U.S.C. § 10901. That result differed from the conclusion reached in *Missouri Pacific R.R. v. UTU*, *supra*, because, according to the Eighth Circuit, the *Missouri Pacific* case involved an application of the immunity granted by 49 U.S.C. § 11341(a) to override the strictures of the Norris-LaGuardia Act, whereas Section 11341(a) was not applicable to the *Burlington Northern* case. *See Appendix A at 13a-15a*. The Third Circuit had rejected the *Missouri Pacific* case's holding for a similar reason. Pet. App. at A-12 n.8.

Petitioner's reliance on *Texas & New Orleans* is similarly misplaced because that case, too, involved the question of whether Section 11341(a)'s predecessor, 49 U.S.C. § 5(11) (1970) (repealed by Pub. L. No. 95-473, 92 Stat. 1337, and recodified as 49 U.S.C. § 11341(a)), operated to restore to the federal courts the jurisdiction which the Norris-LaGuardia Act has withdrawn to enjoin strikes. The Fifth Circuit answered that question by holding that Section 11341(a)'s predecessor did not restore that jurisdiction. While the court then went on to add that if the differences between the unions and the carriers should subsequently "prove irreconcilable, and the question [as to the appropriate employee protection] is suitably presented to the Commission" (307 F.2d at 162), a Commission decision that the union's request for relief was contrary to the public interest "may" give the carriers "ground for" injunctive relief, that statement is clearly not a holding; it is mere *dicta*. More important, that *dicta*, RLEA submits, is contrary to this Court's holding in *Burlington Northern R.R. v. BMWE*, *supra*, 95 L. Ed.2d at 391 n.3, that the Norris-LaGuardia Act may not be accommodated to a non-labor statute, such as the Interstate Commerce Act.

Finally, it should be observed that the Third Circuit's decision has been followed by every district court recently called upon by the railroads to enjoin strikes by rail labor growing out of sales of rail lines exempted from regulation by *Ex Parte No. 392*.¹⁰ In short, this case does not present a conflict which needs to be resolved at this time by this Court.

4. While RLEA does not assert that this case is moot, and indeed submits it is not moot because of the uncertainty over the outcome of the current negotiations, the relationship of this petition to the Third Circuit's decision of April 8, 1988, affirming the injunction requiring the P&LE to comply with the Railway Labor Act (*RLEA v. P&LE*, 845 F.2d 420, *pet. for cert. pending*, Sup. Ct. No. 87-1888), militates against a review of this decision until after the April 8th decision is reviewed or that petition is denied. There is no strike of the P&LE at this time, and none is threatened because the need for economic action was removed by the courts' enforcement of the Railway Labor Act. Thus, this case may never be a good vehicle to resolve the Norris-LaGuardia Act accommodation issue.

¹⁰ Besides the cases involved in *Burlington Northern*, *supra*, those cases include: *Chicago & North Western Transportation Co. v. RLEA*, N.D. Ill. No. 88 C 0444, decided March 16, 1988, *appeal pending*, 7th Cir. No. 88-1504; *Atchison, Topeka & Santa Fe Ry. v. RLEA*, N.D. Ill. No. 87 C 9847, decided November 20, 1987 (TRO denied); *City of Galveston v. UTU*, S.D. Tx. No. G-87-386, decided November 18, 1987 (injunction dissolved).

CONCLUSION

For the reasons set forth above, respondent RLEA respectfully submits that this Court should withhold acting on the P&LE's petition for a writ of certiorari in this case until after this court resolves the petitions in Sup. Ct. Nos. 87-1911 and 87-1888.

Respectfully submitted,

WILLIAM G. MAHONEY
JOHN O'B. CLARKE, JR.*

HIGHSAW & MAHONEY, P.C.
Suite 210
1050 17th Street, N.W.
Washington, D.C. 20036
(202) 296-8500

*Attorneys for Respondent
Railway Labor Executives'
Association*

* Counsel of Record

June 6, 1988

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-2581

BURLINGTON NORTHERN RAILROAD COMPANY,
Appellee,
v.

UNITED TRANSPORTATION UNION,
Appellant.

FRED A. HARDIN, J.W. REYNOLDS,
BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
J. F. SYTSMA and W. C. WALPERT.

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
v.

BURLINGTON NORTHERN RAILROAD COMPANY,
Appellee,
v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
UNITED TRANSPORTATION UNION,
Appellant.

No. 87-2600

BURLINGTON NORTHERN RAILROAD COMPANY,
Appellant,

v.

UNITED TRANSPORTATION UNION,
Appellee,

FRED A. HARDIN, J.W. REYNOLDS,
BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
J. F. SYTSMA and W. C. WALPERT.

RAILWAY LABOR EXECUTIVES' ASSOCIATION,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,
Appellant,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
UNITED TRANSPORTATION UNION,
Appellee.

Appeal from the United States District Court
for the Western District of Missouri

Submitted: December 15, 1987

Filed: May 31, 1988

Before HEANEY, ARNOLD and FAGG, Circuit
Judges.

HEANEY, Circuit Judge.

I. Overview

Burlington Northern Railroad Company (BN) announced its intention to sell a section of its rail lines to the Montana Rail Link (MRL), a newly formed corporation. This type of transaction was recently exempted from Interstate Commerce Commission (ICC) approval requirements, which generally involved the imposition of labor protective conditions. See *Ex Parte No. 392* (Sub. No. 1), *Class Exemption for the Acquisition and Operation of Rail Lines under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1986), review denied *sub nom. Illinois Commerce Comm'n v. ICC*, 817 F.2d 145 (D.C. Cir. 1987) (*Ex Parte No. 392*). After unsuccessfully attempting both to engage BN in negotiations over the effects of the sale on BN employees and later to enjoin the sale, the United Transportation Union (UTU) threatened to strike. BN sought a preliminary injunction against the strike. The district court denied BN's request, finding the Norris-LaGuardia Act, 29 U.S.C. §§ 110-115 (Norris-LaGuardia) prohibited such relief. It did, however, grant an injunction pending review by our Court. On appeal, BN claims that Norris-LaGuardia must be accommodated to the action of the ICC in *Ex Parte No. 392*, and thus cannot bar an injunction. Alternatively, it argues that the Railway Labor Act, 45 U.S.C. § 151-188 (RLA), prohibits the strike because the UTU has not exhausted major dispute procedures under that Act.

We affirm the decision of the district court insofar as it held that Norris-LaGuardia prevents the issuance of an injunction here, and we dissolve the injunction issued by the district court pending this appeal. Second, we find the RLA's major dispute procedures are, in this instance,

superseded by the terms of the Interstate Commerce Act, 49 U.S.C. § 10101-11917 (ICA), and thus cannot bar the strike.

II. Factual Background

In July, 1987, BN announced its intention to lease approximately 830 miles of its trackage to MRL, a newly formed corporation. These rail lines extend from Huntley, Montana, to Sand Point, Idaho. BN also proposed to sell various branch lines, equipment, personal property, and facilities to MRL. In the past, this transaction would have been contingent upon the approval of the ICC, and labor protective conditions would normally have been imposed for the protection of BN employees. However, recently, such sales have been exempted from ICC approval procedures. See *Ex Parte No. 392*, 1 I.C.C.2d 810 (1986).

In compliance with *Ex Parte No. 392*, MRL filed a petition for exemption. Under the terms of *Ex Parte No. 392*, such exemptions are automatically granted seven days after they are filed. See 49 C.F.R. § 1150.32(b). Several parties requested a stay of the exemption. The ICC, however, denied those requests and the exemption issued on July 31, 1987. Finance Docket No. 31087, decided July 31, 1987, *Montana Rail Link, Inc.—Exemption Acquisition and Operation—Certain Lines of the Burlington Northern Rail Company*. Subsequently, a number of the unions representing BN employees, including the UTU, filed petitions to revoke the exemption. These petitions requested labor protection for BN employees affected by BN's action. The ICC has not yet ruled on these petitions. The transaction was closed on October 31, 1987, after the ICC made a specific finding that it was "in the public interest" and after the unions unsuccessfully sought an injunction against the transaction in the United States District Court for the District of Montana. *United Transp. Union v. Burlington Northern R.R.*, 672 F. Supp. 1579 (D. Mont. 1987).

Before the Montana district court, the unions sought to enjoin the sale and maintain the status quo until the arbitration and mediation provisions of the RLA were exhausted. The district court refused to grant this request. Relying on *Railway Labor Executives' Ass'n v. Staten Island R.R.*, 792 F.2d 7 (2d Cir. 1986), cert. denied, — U.S. —, 107 S.Ct. 927 (1987), it found that the mandatory bargaining procedures of the RLA would frustrate the action of the ICC and thus did not provide the court with authority to issue an injunction. 672 F. Supp. at 1582. However, the court, citing *Railway Labor Executives' Ass'n v. Pittsburgh & Lake Erie R.R.*, 831 F.2d 1231 (3rd Cir. 1987), did note that there was no inherent incompatibility between the ICC's action and the provisions of Norris-LaGuardia, thus suggesting that Norris-LaGuardia would bar an effort to enjoin a subsequent strike by the unions. 672 F. Supp. at 1582-83 n.3. The UTU has appealed this decision to the Ninth Circuit.

After the Montana district court denied the unions' motion to enjoin the sale, the UTU threatened a nationwide strike against BN. BN immediately sought a temporary restraining order and a preliminary injunction from Judge Joseph E. Stevens of the United States District Court for the Western District of Missouri. See *Burlington Northern R.R. v. United Transp. Union*, No. 86-5013-CV-SW-8, slip op. (W.D. Mo. Nov. 16, 1987). The court granted the temporary restraining order but subsequently denied the request for a preliminary injunction. In declining to issue a preliminary injunction, Judge Stevens placed primary reliance on *Pittsburgh and Lake Erie*, 831 F.2d 1231. A few hours later, the court granted BN's motion for an injunction pending appeal. We denied UTU's motion to suspend the injunction pending appeal and directed BN to avoid further layoffs until we had decided the matter.

On appeal, BN contends that the ICA vests the ICC with exclusive and plenary jurisdiction to resolve disputed issues. Thus, they argue, Norris-LaGuardia does not bar an injunction against the proposed strike. Second, BN maintains the RLA prohibits the strike since UTU has not exhausted major dispute procedures.

III. The ICA, the RLA and Norris-LaGuardia

A. Statutory Framework

1. The Interstate Commerce Act (ICA)

The ICA is fundamentally a statute designed to regulate commerce. Its goal is to make commerce flow smoothly to the benefit of both American industry and consumers. The Act seeks to ensure fair shipping rates, safety and efficiency in transportation, and to preserve the viability of various modes of transportation. The ICA also seeks to discourage harmful monopolistic practices, detrimental state regulation, and labor strife—all of which tend to impede commerce to the detriment of industry and consumers. *See* 49 U.S.C. §§ 10101, 10101a.

The ICA generally requires that before a railroad acquires an additional line or abandons a line, the rail carriers involved in the transaction must obtain the approval of the ICC, 49 U.S.C. §§ 10901, 10903. Pursuant to the ICA's goal of preventing labor strife by "encourag[ing] fair wages and safe and suitable working conditions in the railroad industry," *see* 49 U.S.C. § 10101a(12), approval by the ICC has in the past generally required the imposition of plans to compensate workers displaced by the particular transaction. These plans are called labor protective conditions or labor protective agreements. Under its authority, the ICC has developed standard labor protective conditions for particular types of transactions.¹

¹ When the transaction involves the sale of a rail line, the ICC imposes its *New York Dock* conditions upon the parties. *See New*

In the early 1970's the railroad industry, for a variety of reasons, began to experience economic difficulty. In 1976, concern about the "financial health" of this industry prompted Congress to pass the Railroad Revitalization and Regulatory Reform (4-R) Act, Pub. L. No. 94-210, 90 Stat. 31 (1976). The 4-R Act empowered the ICC, *inter alia*, to exempt individual transactions or classes of transactions from the Act's prior approval requirements (and thus avoid the cost of labor protective conditions). Pub. L. No. 94-210, 90 Stat. at 42.

Four years later, in another deregulatory effort, Congress passed the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980). In the Staggers Act, Congress attempted to "reduce regulatory barriers to entry into and exit from the [railroad] industry." *Id.* § 101(a), 94 Stat. 1897, codified at 49 U.S.C. § 10101a. Specifically, the Act broadened the exemption provisions codified at 49 U.S.C. § 10505, to provide that exemptions "shall" be granted to carry out the Staggers Act national rail policy. 94 Stat. at 1913.

In 1986, the ICC, in an *ex parte* rule-making procedure, exercised its new section 10505 power to exempt, as a class, line sales to "new carriers"² from the detailed approval procedures required under section 10901. *See Ex Parte No. 392*, 1 I.C.C.2d 810 (1986). To facilitate these sales, the ICC further prescribed an expedited approval procedure in place of the procedure that would otherwise apply under section 10901(b). Under the class exemption, sales to new carriers are authorized to go forward seven days after the parties file verified notices with the ICC. *Id.* at 820, *see also* 49 C.F.R. § 1150.32(b).

York Dock Ry.—Control—Brooklyn E.D. Terminal, 360 I.C.C. 60 (1979), *aff'd*, 609 F.2d 83 (2d Cir. 1979). If it is a case of abandonment, it imposes *Oregon Short Line III* conditions. *See Oregon Short Line R.R.—Abandonment*, 360 I.C.C. 91 (1979).

² "New carrier" means a newly formed railroad not already subject to the ICA.

The ICC's action in *Ex Parte No. 392* was appealed to the United States Court of Appeals for the District of Columbia Circuit. That court denied review of the ICC's action without an opinion. *Illinois Commerce Comm'n v. ICC*, 817 F.2d 145 (D.C. Cir. 1987).

2. The Railway Labor Act (RLA)

The RLA regulates the relationship between railroads and their employees. The purposes of the Act include avoiding interruption to commerce, ensuring worker freedom of association and the right to unionize, providing for the "prompt and orderly" settlement of employment related disputes, and securing the "complete independence" of railroads and their employees in matters of self-organization and in carrying out the Act's other purposes. See 45 U.S.C. § 151a.

Under the RLA, controversies over proposed changes in collective bargaining agreements are termed "major" disputes (to be distinguished from "minor" disputes over the "interpretation or application" of existing agreements and practices). *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711, 723-24 (1945). Under §§ 2 Seventh and 6 of the Act, a party desiring to change a working condition embodied in an existing agreement, or to bring a condition not previously covered within an agreement, must serve a "§ 6 notice" upon the opposing party. 45 U.S.C. §§ 152 Seventh, 156. The resulting major dispute is subject to dispute resolution including conference, mediation, and, in some cases, proceedings before a presidential emergency board. 45 U.S.C. §§ 155, 156, 160. Until these procedures are exhausted, neither party may change the status quo, i.e., the "actual objective working conditions" in existence at the beginning of the dispute. *Detroit & T. Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 149, 153 (1969).³

³ The Act lacks any mechanism to compel agreement in major disputes. Binding arbitration of a major dispute is available only

3. The Norris-LaGuardia Act

The Norris-LaGuardia Act withdraws jurisdiction from the federal courts in cases growing out of labor disputes. The Act clearly states:

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as the terms are herein defined) from * * *

(a) Ceasing or refusing to perform any work or to remain in any relation of employment.

29 U.S.C. § 104.

The public policy behind Norris-LaGuardia is clearly stated in the Act. Specifically, the Congress found that prevailing socio-political and economic conditions prevented individual workers from obtaining "acceptable terms and conditions of employment." Therefore, Norris-LaGuardia sought to ensure workers the right to organize and conduct union activities "free from the interference, restraint, or coercion" of employers or their agents by means of labor injunctions. See 29 U.S.C. § 102.

if both parties agree to it. See 45 U.S.C. §§ 155, 157; *Elgin J. & E. Ry.*, 325 U.S. at 725.

Section 3 of the RLA commits minor disputes over the "interpretation or application" of existing agreements and practices to the exclusive jurisdiction of Adjustment Boards, i.e. to "compulsory arbitration." *Brotherhood of R.R. Trainmen v. Chicago R. & I. R. R.*, 353 U.S. 30, 39 (1957); 45 U.S.C. § 153 First (i); see *Elgin J. & E. Ry.*, 325 U.S. at 724. If the resolution of a labor dispute arguably depends upon the interpretation or application of a collective bargaining agreement or established past practice, the dispute must go to an Adjustment Board, not to a court. *Brotherhood of Maintenance of Way Employees v. Burlington Northern Ry.*, 802 F.2d 1016, 1022 (8th Cir. 1986). While the controversy is pending before the Board, the carrier is free to apply its interpretation of the disputed agreement or past practices. *Id.*

B. Analysis

As noted above, the ICA is fundamentally a commerce statute directed toward ensuring the free flow of commerce. The RLA is a labor statute that orders the relationship between railroads and their employees. Norris-LaGuardia is a jurisdictional labor statute designed to deal with historical anti-union animus in the federal courts by withdrawing jurisdiction in cases growing out of labor disputes. Each of these congressional enactments are intended to be preeminent in terms of the subject matter they regulate. However, toward the periphery of the authority granted under each law, there exist overlapping powers and responsibilities which must be accommodated and harmonized.

For example, when the imperatives of labor statutes such as the RLA and Norris-LaGuardia conflict, the federal courts have determined that if the provisions of the RLA represent some "overriding, equally clear yet irreconcilable labor policy" which would be frustrated by the literal enforcement of Norris-LaGuardia's anti-injunction provisions, the latter act can be accommodated. *Railway Labor Executives' Ass'n v. Pittsburgh & Lake Erie R.R.*, 831 F.2d 1231, (citing *Chicago & North Western Ry. v. United Transp. Union*, 402 U.S. 570 (1971); *Boys Market, Inc. v. Retail Clerk's Union Local 770*, 398 U.S. 235 (1970); *Brotherhood of Locomotive Eng'rs v. Louisville & Nashville R.R.*, 373 U.S. 33 (1963); *Brotherhood of R.R. Trainmen v. Chicago & Indiana R.R.*, 353 U.S. 30 (1957); *Brotherhood of Ry. Trainmen v. Howard*, 343 U.S. 768 (1952)).

Yet, the problem of harmonizing labor statutes with statutes in other fields—particularly those which encourage commerce and industrial expansion—presents far more difficult balancing problems. In this age of trade unions with nationwide membership, it is increasingly difficult to remember that without the clear protections erected by the Congress in Norris-LaGuardia, the RLA,

and the National Labor Relations Act, 29 U.S.C. §§ 151-187, the right to organize, the right to bargain collectively, and the right to strike in the United States were simply untenable propositions.

The preamble to Norris-LaGuardia recognized this problem in stark terms. The statute withdrew jurisdiction from the federal courts to enjoin labor disputes in the realization that:

under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, *the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment ***.*

29 U.S.C. § 102 (emphasis added).

Moreover, the Supreme Court has recently recognized the fundamental importance of Norris-LaGuardia in terms of the viability of the labor movement:

The Norris-LaGuardia Act . . . express a basic policy against the injunction of activities of labor unions.

The congressional debates over the Norris-LaGuardia Act disclose that the Act's sponsors were convinced that the extraordinary step of divesting federal courts of equitable jurisdiction was necessary to remedy an extraordinary problem.

The Norris-LaGuardia Act responded directly to the *** pattern of injunctions entered by federal judges. "The underlying aim of the Norris-LaGuardia Act was to restore the broad purpose which Con-

gress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive judicial construction."

Burlington Northern R.R. v. Brotherhood of Maintenance of Way Employees, 481 U.S. —, 107 S.Ct. 1841, 1846-47 (1987) (citations omitted).

Finally, experience shows that as the protections of labor statutes are diluted, even under the "neutral" terms of deregulatory actions by Congress, the economic power of employees is visibly diminished by both contracting the authority of their representatives to bargain on their behalf and by reducing the ranks of their organized membership.

With this in mind, we turn to the task of exploring the interplay between the ICA, the RLA, and Norris-LaGuardia.

Under the ICA, Congress sought to provide the ICC with the means to prevent labor strife by assuring "fair wages and working conditions in the railroad industry." 49 U.S.C. § 10101a(12). To accomplish this important but limited aim, Congress provided the ICC superseding authority to supervise and implement labor protective conditions in terms of acquisitions, sales, and abandonments of railroad lines. But it did so only insofar as this authority is necessary to "assure fair wages and working conditions" in order to ensure the free flow of commerce. In these narrow circumstances, the ICA supersedes the authority of the mandatory bargaining provisions of the RLA which provide an essentially duplicative or overlapping process designed to reach labor protective agreements. Were it otherwise, the ICC's authority in this area, and specifically its recent deregulatory actions, would be largely nullified. However, the ICA does not so easily supersede Norris-LaGuardia for, except where Congress has specifically exempted the ICA from the operation of other laws and required mandatory labor

protective conditions, nowhere in the ICA is there any indication of its direct incompatibility with the anti-injunction statute. Clearly, Norris-LaGuardia says nothing about the methods by which labor protective agreements are made, but rather represents a completely independent and very clear decision by Congress to insulate labor disputes from the injunctive powers of the federal courts.

Our decision in *Missouri Pacific Ry. v. United Transp. Union*, 782 F.2d 107 (8th Cir. 1986) (per curiam), cert. denied, — U.S. —, 107 S.Ct. 3209 (1987), when read in conjunction with *Railway Labor Executives' Ass'n v. Staten Island R.R.*, 792 F.2d 7 and *Railway Labor Executives' Ass'n v. Pittsburgh & Lake Erie R.R.*, 831 F.2d 1231 illustrates implicitly the interaction of these three federal statutes.

In *Missouri Pacific*, we held that when a consolidation transaction subject to 49 U.S.C. §§ 11341, 11347, statutory provisions which specifically exempt carriers from all other law⁵ and require mandatory employee protective conditions⁶, neither the RLA nor Norris-LaGuardia

⁵ 49 U.S.C. § 11341(a) provides:

The authority of the Interstate Commerce Commission under this subchapter is exclusive. * * * A carrier, corporation, or person participating in [an] approved or exempted transaction is exempt from all other law, including State and municipal law, as necessary to let that person carry out the transaction.

* * *

"[T]his subchapter" refers to Subchapter III of Chapter 113 of the ICA, §§ 11341-51, under which the transaction in *Missouri Pacific* was approved, and not 49 U.S.C. § 10901, Subchapter I of Chapter 109 of the Act, applicable here.

⁶ 49 U.S.C. § 11347 provides:

When a carrier is involved in a transaction for which approval is sought under [the consolidation provisions] of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement * * * protective of the interest of employees who are affected by the transaction * * *.

could operate to restrict the terms of the ICA. In the *Staten Island* case, the Second Circuit found, in a transaction governed by 49 U.S.C. § 10905 (similar to the transaction here in controversy), there was jurisdiction under the RLA in terms of the bargaining relationship between the railroad and the unions. However, the court found that the ICA's action approving the transaction withdrew from the courts the power under the RLA to "formulate a meaningful remedy without impinging on the ICC's order approving the sale in question."⁷ 792 F.2d at 12, *see also United Transp. Union v. Burlington Northern R.R.*, 672 F. Supp. 1579, 1582-83. They thus dismissed the case under Fed. R. Civ. P. 12(b) (6).⁸

Finally, in the *Pittsburgh & Lake Erie* case, the Third Circuit, with a transaction identical to the one before us, faced a request by an employer railroad to accommodate Norris-LaGuardia to the ICA. The court refused to do so, recognizing both the overriding importance of Norris-LaGuardia and finding no irreconcilability between the ICC's authority over the bargaining process and Norris-LaGuardia's prohibition against injunctions. Specifically, the court stated:

[None of the provisions] relied on by P & LE which makes the ICC's authority "exclusive" with respect to combinations of carriers, contains any language which would suggest Congress intended to override the anti-injunction policy of section 4 of the Norris-LaGuardia Act by the Interstate Commerce Act.

* * * Neither the ICC nor P & LE have pointed to any language in the legislative history of any of the

⁷ In *Staten Island*, the viability of Norris-LaGuardia in terms of the ICA was not at issue.

⁸ In *Railway Labor Executives' Ass'n. v. Pittsburgh & Lake Erie R.R.*, No. 87-3797, slip op. (3rd Cir. April 8, 1988), the Third Circuit in a carefully crafted opinion by Judge Becker, recently found that the ICC's action in Ex Parte No. 392 did not preempt the RLA.

labor laws or the Interstate Commerce Act which suggests that the strong national policy embodied in the Norris-LaGuardia Act is to be subordinated to the ICC's authority to approve an acquisition of railroad property.

831 F.2d at 1235-36.

Thus, the interplay of these three statutes can be summed up as follows. When the ICA provides a specific exemption from all other law and mandates inescapable employee protective conditions under provisions such as 49 U.S.C. §§ 11341(a), 11347, it effectively supersedes both the RLA and Norris-LaGuardia. If there is no exemption and specific protection is not mandated, the authority of the ICA only extends to the bargaining process concerning wages and working conditions. In these circumstances, while the bargaining provisions of the RLA are superseded, Norris-LaGuardia is unaffected and remains to protect the employees' interests.⁹

⁹ In *United Transp. Union v. Burlington Northern R.R.*, 672 F. Supp. 1579, the United States District Court for the District of Montana came to exactly this conclusion. This court, like ours, relying on *Staten Island*, found that mandatory bargaining provisions of the RLA were superseded by the terms of the ICA. However, the court, citing *Pittsburgh & Lake Erie*, found that the ICC's action did not affect the viability of Norris-LaGuardia. Specifically, the court stated:

Both parties have brought to the attention of the court an opinion handed down by the Third Circuit on October 26, 1987, where the court reversed a district court decision enjoining a labor strike. The Third Circuit found that Section 4 of Norris-LaGuardia need not be accommodated to the Interstate Commerce Act. *Railway Labor Executives' Association v. Pittsburgh & Lake Erie R.R. Co.*, 831 F.2d 1231 (3d Cir. 1987).

The case involved facts very similar to those in the instant case. The Railroad was selling its rail lines to a new non-carrier entity which filed for, and received, an exemption pursuant to section 10505 of the ICA. The union filed section 6 notices pursuant to the RLA and the railroad refused to negotiate. However, there the union chose to strike. Section 4 of

Moreover, this notion of the viability of Norris-LaGuardia in the face of the supersedure of the RLA is clearly in line with what Congress intended. In examining the impetus behind the recent deregulatory efforts in the railroad industry, Congress has sought to free the union-management relationship from time-consuming, "process oriented" bureaucracy imposed by various regulatory statutes and to allow the sagacious invisible hand of the free market economy to reorder rapidly that industry's economic difficulties. Thus, while we agree with BN's contention that enforcing the mandatory bargaining provisions of the RLA might render the changes in the ICA without much practical force, we find, like the Third Circuit, no inherent incompatibility between these actions and Norris-LaGuardia. Clearly implicit in the congressional vision of a vigorous free market is the realization that all major participants in the economy must be left free to exercise their economic strength and thus return the economy to its natural order. We thus find it impossible to believe that Congress would leave the railroads free to exercise their economic power to advance their goals, yet forbid the unions to use their strength to protect the interests of their membership.

In the end, should Congress wish to accomodate Norris-LaGuardia to the ICC in this situation, it can do so explicitly. Such a decision concerning such a significant

the Norris-LaGuardia Act forbids federal district court injunctions against labor strikes. 29 U.S.C. § 104.

A strike by union members against their employer does not directly contradict or encroach upon the authority of the ICC. The authorization of the sale still stands, and at the same time the employees have the right to pressure the employer to negotiate labor protections. The case is distinguishable in that an injunction of the sale would itself directly contradict and infringe upon the authority of the ICC. Congress has given full authority over sales and acquisitions of railroads to the ICC pursuant to the ICA.

672 F. Supp. at 1582-82 [sic] n.3 (emphasis added).

change in federal labor policy is too important to be found implicitly by a court in the interstices of a federal statutory scheme.

IV. Conclusion

In its decision in *Ex Parte No. 392*, the ICC has acted within its authority by exempting, as a class, sales to new carriers from the requirement of imposing labor protective conditions. Moreover, the ICC's authority to supervise and implement labor protective conditions in terms of sales, acquisitions, and abandonments by railway carriers insofar as this authority is necessary to "assure fair wages and working conditions" supersedes the authority of the mandatory bargaining provisions of the RLA. We thus dismiss BN's claim under the RLA.¹⁰ However, we find no inherent incompatibility between the recent deregulatory efforts of the Congress and the ICC and the continued viability of Norris-LaGuardia in the circumstances presented here. We thus affirm the decision of the district court declining to issue an injunction against the proposed strike by the UTU and dissolve the temporary injunction put in place pending this appeal.

FAGG, Circuit Judge, dissenting.

The district court denied BN's motion for a preliminary injunction against UTU's threatened strike, disclaiming jurisdiction to enjoin the strike on account of

¹⁰ We would alternatively dismiss BN's claim under the RLA on the merits. BN maintains that a strike by the UTU should be enjoined because the UTU did not invoke the major dispute resolution procedures of the RLA and thus must exhaust their remedies before they can strike. The UTU did, however, attempt to do so by serving a Section 6 notice, but was frustrated in this effort by an arbitration award holding that, under the applicable collective bargaining agreements, the Union had no right to serve such a notice before April 1, 1988. We believe the operative fact here is that BN itself changed the status quo without serving a Section 6 notice and would thus be barred from seeking injunctive relief by its own omission.

the Norris-LaGuardia Act (NLGA). See 29 U.S.C. § 104. I do not share the district court's view that injunctive relief is unavailable to protect an ICA order from disruption by a union strike that in essence challenges the terms of that order.

The court correctly observes that when the NLGA and the ICA overlap, they "must be accommodated and harmonized." *Ante* at 10. This accommodation is necessary because neither statute "may meaningfully be read in isolation * * * for they are in fact, an integrated plan of railroad regulation. And if, as is frequently the case in such undertakings, there be overlappings, '[w]e must determine * * * how far Congress intended activities under one of these policies to neutralize the results envisioned by the other.'" *Order of R.R. Telegraphers v. Chicago & N.W. Ry.*, 362 U.S. 330, 352 (1960) (quoting *Ailen Bradley Co. v. Local Union No. 3, Int'l Bhd. of Elec. Workers*, 325 U.S. 797, 806 (1945)) (Whittaker, J., dissenting).

There is no dispute the ICC has discretionary authority to impose labor protective conditions in this type of transaction. See 49 U.S.C. § 10901(c)(1)(A)(ii); *Railway Labor Executives' Ass'n v. Pittsburgh & Lake Erie R.R.*, 831 F.2d 1231, 1235 (3d Cir. 1987); *Winter v. ICC*, 828 F.2d 1320, 1323 (8th Cir. 1987). It is also clear the ICC has the power to grant or deny UTU's pending request for those conditions, *ante* at 4, and UTU will have access to judicial review of an adverse decision, see 28 U.S.C. § 2321(a). Simply stated, Congress has charged the ICC with the responsibility to impose protective labor conditions that are "necessary in the public interest" in section 10901 transactions. 49 U.S.C. § 10901(c)(1)(A)(ii).

The court holds, however, that when labor protective conditions are discretionary rather than mandatory, the ICA cannot displace the NLGA's antiinjunction provisions because that situation presents no "direct incom-

patibility" between the NLGA and the ICA. *Ante* at 13. I believe the court and the Third Circuit have drawn an illusory distinction between mandatory and discretionary conditions. See *Railway Labor Executives' Ass'n*, 831 F.2d at 1334-37. This approach to the issue has led the court mistakenly to conclude the district court was correct in deciding it was without jurisdiction to enjoin the UTU strike, and it is at this point that I respectfully part company with the court.

What is really involved in this case is this: whether UTU, displeased with ICC approval of BN's sale of a section of its rail lines to MRL, may bypass the ICC and direct its displeasure at BN for the singular purpose of extracting concessions that are at odds with the terms of the ICC order. I think not, and I believe my view is at the heart of the decision in *Missouri Pacific Railroad v. United Transportation Union*, 782 F.2d 107 (8th Cir. 1986) (per curiam), cert. denied, 107 S. Ct. 3209 (1987) (*MoPac*). In adopting the district court's decision permitting the injunction, the court in *MoPac* stated:

[A]llowing UTU to strike would be tantamount to saying that UTU has carte blanche authority to frustrate and avoid a material term of a consolidation approved by the ICC. Congress did not intend that affected employees have such power to block consolidations which are in the public interest. * * * [I]t is inconceivable that Congress intended that a labor union would be able to participate in ICC approval proceedings and then, if the union was dissatisfied with the result or a part thereof, strike a carrier to obtain the advantage it desired.

Id. at 112.

It is apparent a UTU strike here would be aimed at obtaining the essential equivalent of the same labor protective conditions UTU is actively seeking from the ICC. I am persuaded that in these circumstances, just as in

cases in which protective conditions are mandatory, the NLGA cannot be used to thwart an ICC order approving the BN-MRL transaction. When viewed from this perspective the potential conflict, while undoubtedly relating to BN's relationship with its employees, does not bear the characteristics of an NLGA section 104 labor dispute. I believe Congress, through the ICA, has granted the ICC authority (subject to judicial review) to resolve conclusively the issues UTU seeks to raise by way of the threatened strike.

In sum, the UTU strike threat amounts to an unacceptable neutralization of congressional policy in favor of the ICC's exercise of expert authority to serve the public interest in the area of railroad service. I believe the provisions of the ICA embody the greater interest when a dispute involving a railroad and its employees has been triggered by an order of the ICC. In these circumstances, the competing aspects of the ICA and the NLGA should have been resolved by the district court in favor of the ICA. Thus, I would reverse the district court's order disclaiming jurisdiction to consider BN's injunction request.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 87-5071

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Appellant,
v.

CHICAGO AND NORTHWESTERN TRANSPORTATION COMPANY
and DAKOTA, MINNESOTA AND EASTERN RAILROAD,
Appellees.

STATE OF SOUTH DAKOTA,
Amicus Curiae/Appellee.

Appeal from the United States District Court
for the District of Minnesota

Submitted: December 18, 1987

Filed: May 31, 1988

Before LAY, Chief Judge, and HEANEY and MAGILL,
Circuit Judges.

HEANEY, Circuit Judge.

In this appeal, the Railway Labor Executives' Association (RLEA) asks the Court to reverse the decision of the United States District Court for the District of Minnesota. The district court refused to enjoin the sale of a section of trackage by the Chicago & Northwestern Transportation Company (C&NW) to the Dakota, Minnesota & Eastern Railroad (DM&E) until C&NW exhausted the mandatory bargaining requirements of the Railway Labor Act, 45 U.S.C. §§ 151-188 (RLA). Because we find the RLA in this circumstance superseded by the authority of the Interstate Commerce Act, 49 U.S.C. §§ 10101-11917 (ICA), we affirm the district court.

C&NW had sought for many years to divest itself of certain marginal or light density rail lines in South Dakota. Normally, the sale or abandonment of rail lines is subject to the approval of the Interstate Commerce Commission (ICC). See 49 U.S.C. § 10901, 10903, 10905. The ICC had in the past refused to allow C&NW to rid itself of ~~these~~ rail lines because of the adverse impact of such action on the State of South Dakota.

In January, 1986, the ICC, in an ex parte rulemaking procedure, exempted as a class the sale of rail lines to "new carriers" from the prior approval requirements of the ICA. See *Ex Parte No. 392 (Sub. No. 1), Class Exemption for the Acquisition and Operation of Rail Lines under 49 U.S.C. 10901*, 1 I.C.C. 2d 810 (1986), review denied *sub nom. Illinois Commerce Comm'n v. ICC*, 817 F.2d 145 (D.C. Cir. 1987) (*Ex Parte No. 392*). Following this change in ICC policy, C&NW agreed on July 2, 1986, to sell 826 miles of its rail lines and assign 139 miles of its South Dakota trackage to DM&E, a newly formed railroad.

Beginning in May of 1986, when they learned of the railroad's intention to sell, seven of the unions representing C&NW employees served notices on the C&NW as required under Section 6 of the RLA, 45 U.S.C. § 156.

These notices informed C&NW of the unions' intention to negotiate agreements to require both advance notification of any proposed transfer of rail lines and appropriate employee protective conditions. The unions further sought to obtain a pledge by C&NW to require DM&E to employ C&NW employees, to assume C&NW's collective bargaining obligations, and to apply appropriate employee protective arrangements. Under the terms of the RLA, these notices set in motion a lengthy bargaining process during which the status quo, i.e., the "actual objective working conditions" in existence at the beginning of the dispute, must be preserved. *Detroit & T. Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 149, 153 (1969).

While the parties engaged in discussions, C&NW continued with its plans to sell the South Dakota lines. Pursuant to this goal, both the C&NW and the DM&E filed verified notices with the ICC under *Ex Parte No. 392* to qualify for exemption from prior approval requirements. Once it became apparent that C&NW intended to consummate the sale, notwithstanding the fact that it had not complied with the mandatory bargaining requirements of the RLA, RLEA, an umbrella organization made up of representatives of the various rail unions representing C&NW employees, filed a complaint in the United States District Court for the District of Minnesota on August 19, 1986. In its complaint, RLEA sought a declaratory judgment that C&NW had an obligation under the RLA both to bargain over the proposed transfer and to maintain the status quo until that bargaining was concluded. RLEA also sought interlocutory and then permanent injunctive relief requiring C&NW to bargain and maintain the status quo. C&NW replied that the mandatory bargaining requirements of the RLA were preempted by the provisions of the ICA governing sales and labor protective conditions.

On August 27, 1987, the district court denied RLEA's motion for a preliminary injunction, declaring such re-

lief would "be clearly at loggerheads with the decision of the ICC, particularly as expressed in *Ex Parte 392*." Shortly after that ruling, C&NW and DM&E consummated the sale, and on September 5, 1987, DM&E began operating over its newly acquired trackage. Once the sale was consummated, RLEA concentrated its attack on C&NW's bargaining obligation and duty to maintain the employment status quo of its employees whom RLEA asserted were improperly affected. Both sides moved for summary judgment. On January 7, 1987, the district court orally denied RLEA's motion, again finding that the ICC's action in *Ex Parte No. 392* would be undermined if the provisions of the RLA were enforced and C&NW was required to bargain with the railroad unions. This appeal followed.

In *Burlington Northern R.R. v. United Transp. Union*, No. 87-2851, slip op. (8th Cir. May 31, 1988), a case decided today involving a similar railroad transaction exempted under *Ex Parte No. 392* from normal ICC approval requirements, we held that the provisions of the ICA governing labor protective agreements supersede the mandatory bargaining requirements of the RLA. Specifically, we stated:

Under the ICA, Congress sought to provide the ICC with the means to prevent labor strife by assuring "fair wages and working conditions in the railroad industry." 49 U.S.C. § 10101a(12). To accomplish this important *but limited aim*, Congress provided the ICC superseding authority to supervise and implement labor protective conditions in terms of acquisitions, sales, and abandonments of railroad lines. Yet it did so only insofar as this authority is necessary to "assure fair wages and working conditions" in order to ensure the free flow of commerce. In these narrow circumstances, the ICA supersedes the mandatory bargaining provisions of the RLA which provide an essentially duplicative or overlapping

process designed to reach labor protective agreements.

Id. at 12.

The RLEA's claim would require us to invoke the mandatory bargaining provisions of the RLA. Because in the present circumstances these provisions are superseded by the ICA, we affirm the decision of the district court.

LAY, Chief Judge, dissenting.

I respectfully dissent. I cannot agree that the Interstate Commerce Act, 49 U.S.C. §§ 10101-11917 (1982) (ICA), was intended to supersede the mandatory bargaining requirements of the Railway Labor Act, 45 U.S.C. §§ 151-188 (1982) (RLA). I do not believe that Congress intended the ICA proceedings to be a means of providing labor security and protection which is inherent under the mandatory bargaining procedure of the RLA. The ICA focuses on national transportation policy. See 49 U.S.C. § 10101a. Although the interest of labor may be asserted in proceedings before the Interstate Commerce Commission (ICC), I agree with the Third Circuit's view that it is highly unlikely "that Congress intended that rail labor look for its sole protection to an agency that lacks expertise in this field." *Railway Labor Executives' Ass'n v. Pittsburgh & Lake Erie R.R.*, No. 87-3797, slip op. at 56 (3d Cir. Apr. 8, 1988). It is clear to me that the ICC lacks expertise in the field of labor security. I respectfully conclude that Congress did not intend to include labor protective conditions within the ICC proceedings so as to supersede labor's protective mechanisms under the Railway Labor Act.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX C

**Railway Labor Executives' Association
Member Organizations**

American Railway & Airway Supervisors' Association (Division of TCU);
American Train Dispatchers' Association;
Brotherhood of Locomotive Engineers;
Brotherhood of Maintenance of Way Employes;
Brotherhood of Railroad Signalmen;
Brotherhood of Railway Carmen (Division of TCU);
Hotel Employees and Restaurant Employees International Union;
International Association of Machinists and Aerospace Workers;
International Brotherhood of Boilermakers and Blacksmiths;
International Brotherhood of Electrical Workers;
International Brotherhood of Firemen & Oilers;
International Longshoremen's Association;
National Marine Engineers' Beneficial Association;
Railroad Yardmasters of America (Department of UTU);
Seafarers' International Union of North America;
Sheet Metal Workers' International Association;
Transport Workers Union of America;
Transportation • Communications Union (TCU); and
United Transportation Union.